RECENT CASES

Administrative Law—Actions of National Labor Relations Board Immune to Injunctive Interference by Federal Courts—The National Labor Relations Board, pursuant to its authority under the controlling act,[1] notified plaintiff corporation of a proposed hearing of a complaint which averred that the plaintiff engaged in unfair labor practices. Thereupon, the plaintiff, denying that the Board had jurisdiction, and alleging irreparable injury if the proceedings were allowed, obtained an injunction against the Board.[2] The circuit court of appeals having affirmed the decree,[3] and denied a rehearing [4] after the act was declared constitutional by the Supreme Court,[5] certiorari was granted. *Held,* that the district court should have refused the injunction since Congress had given exclusive jurisdiction over labor matters to the Board, and the act provided for an adequate remedy by appeal from the Board's decisions. *Myers v. Bethlehem Shipbuilding Corp. Ltd.,* U. S. Sup. Ct., (1938) 5 U. S. L. WEEK 603.

Under similar facts, plaintiff, a Virginia corporation, was denied an injunction on the ground that the act provided adequate relief. This was affirmed by the circuit court,[6] and certiorari was granted because of conflict with the above case. *Held,* that the injunction was properly refused. *Newport News Shipbuilding & Dry Dock Co. v. Schauffler,* U. S. Sup. Ct., (1938) 5 U. S. L. WEEK 605.

Although the instant cases are the first in which the Supreme Court has ruled that a district court cannot enjoin the proceedings of the National Labor Relations Board, all but one of the circuit court decisions have so held.[7] The constitutionality of the Board's jurisdiction over labor matters affecting interstate commerce having been upheld in the *Jones & Laughlin* case,[8] the fundamental contention of the petitioners was that they engaged in intrastate transactions alone. They claimed, therefore, that the Board had no jurisdiction over them, and that the proposed hearings would cause irreparable injury. However, the mere fact that an administrative remedy may be costly is insufficient to warrant judicial interference.[9] Furthermore, since the act provides expressly that the Board shall have exclusive jurisdiction over all complaints,[10] and that its findings are subject to judicial review,[11] there is no ground for injunctive interference from the courts. It is well settled that judicial relief cannot be sought until the administrative remedies prescribed have been exhausted.[12] Thus, the courts have refused to

1. THE NATIONAL LABOR RELATIONS ACT, 49 STAT. 449 (1935), 29 U. S. C. A. §§ 151-166 (Supp. 1937).
2. 15 F. Supp. 915 (D. Mass. 1936), 25 GEO. L. J. 470 (1937).
3. 88 F. (2d) 154 (C. C. A. 1st, 1937).
4. 89 F. (2d) 1000 (C. C. A. 1st, 1937).
5. National Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937), 85 U. OF PA. L. REV. 733.
6. 91 F. (2d) 730 (C. C. A. 4th, 1937).
7. Bradley Lumber Co. v. National Labor Relations Bd., 84 F. (2d) 97 (C. C. A. 5th, 1936); E. I. Dupont de Nemours & Co. v. Boland, 85 F. (2d) 12 (C. C. A. 2d, 1936); Heller Bros. Co. v. Lind, 86 F. (2d) 862 (App. D. C. 1936); Clark v. Lindemann & Hoverson Co., 88 F. (2d) 59 (C. C. A. 7th, 1937); Pratt v. Oberman & Co., 89 F. (2d) 786 (C. C. A. 8th, 1937). *Contra:* Myers v. Bethlehem Shipbuilding Corp., 88 F. (2d) 154 (C. C. A. 1st, 1937) (first of instant cases, lower ct.).
8. See *supra* note 5.
9. See Bradley Lumber Co. v. National Labor Relations Bd., 84 F. (2d) 97, 100 (C. C. A. 5th, 1936).
10. 49 STAT. 453 (1935), 29 U. S. C. A. § 160 (Supp. 1937).
11. 49 STAT. 455 (1935), 29 U. S. C. A. § 160 (f) (Supp. 1937).
12. Where no further remedy remains, an injunction will be granted. See, for example, Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287 (1920) (no means of appeal from rates set by Public Service Commission).

restrain proceedings of the Interstate Commerce Commission,[13] the Federal Trade Commission,[14] and other federal [15] and state [16] administrative bodies where the administrative remedy remained. As stated by the court in the first of the two instant cases, to hold otherwise would be to deprive the Board of the powers which Congress intended that it should have.

Conflict of Laws—Effect of Stipulation that Fraternal Beneficiary Society Shall be Defined by Law of Member's State—Defendant fraternal beneficiary society incorporated in Illinois issued a life insurance policy to plaintiff's wife in Kansas. The insured had been missing and unheard-of for over seven years before plaintiff brought this action, relying on the common law presumption of death.[1] By a section of the Society's by-laws, members waived the right to rely on presumptions of this nature. In Kansas such waiver clauses are regarded as against public policy and void.[2] In Illinois this identical clause had been held valid and enforceable.[3] *Held,* that because of a provision in the policy stating that the defendant was a fraternal beneficiary society as defined by the statutes of the member's state, the law of Kansas should govern, the waiver clause disregarded, and the common law presumption of death allowed. *Green v. Royal Neighbors of America,* 73 P. (2d) 1 (Kan. 1937).

Ordinarily a contract made in Kansas would be governed by Kansas law.[4] However, the Supreme Court in the case of *Supreme Council of Royal Arcanum v. Green* [5] held in effect [6] that the rights of members of a fraternal beneficiary society are governed by its articles and by-laws as interpreted by the jurisdiction in which the society is incorporated, and that foreign states are bound by the Constitution [7] to give full faith and credit to the decisions of the corporation's domicil. This case was followed by the Supreme Court in the subsequent decision of *Modern Woodman v. Mixer,*[8] which held the principle applicable in determining the validity of a waiver of the common law presumption of death. The court in the instant case recognized the authority of these decisions but held they did not govern the disputed policy which provided that the defendant was "a fraternal beneficiary society . . . as defined by the statutes of the state where the member resides". Aside from the doubtful interpretation given this latter provision by the

13. United States v. Illinois Central R. R., 291 U. S. 457 (1934).
14. Federal Trade Commission v. Claire Furnace Co., 274 U. S. 160 (1927).
15. Kreutz v. Durning, 69 F. (2d) 802 (C. C. A. 2d, 1934) (Customs Board).
16. Hegeman Farms Corp. v. Baldwin, 293 U. S. 163 (1934) (New York Milk Control Board); Lazarevich v. Stoeckel, 117 Conn. 260, 167 Atl. 823 (1933) (Commissioner of Motor Vehicles); Horton v. Clark, 316 Mo. 770, 293 S. W. 362 (1927) (State Board of Health).

1. McKay v. Kansas Soldiers' Compensation Bd., 126 Kan. 120, 266 Pac. 935 (1928); cases cited instant case at 5.
2. Fernandez v. Sovereign Camp, 142 Kan. 75, 46 P. (2d) 10 (1935).
3. Steen v. Modern Woodmen of America, 296 Ill. 104, 129 N. E. 546 (1920), 17 A. L. R. 406 (1922).
4. Instant case at 3. This seems to be the present law in Kansas, although the earlier cases were in confusion. See 2 BEALE, CONFLICT OF LAWS (1935) § 332.24. For discussion of this and opposing theories in the choice-of-law problem, see *id.* at §§ 332.1-332.4; Cavers, *A Critique of the Choice-of-Law Problem* (1933) 47 HARV. L. REV. 173.
5. 237 U. S. 531 (1915), L. R. A. 1916A 771, Note (1916) 25 YALE L. J. 324.
6. In detail, the holding was that in determining whether an increase in the assessment rate was binding on the member, the New York court must give full faith and credit to the Massachusetts decisions concerning the society's constitution and by-laws.
7. ART. IV, § 1; see Corwin, *The "Full Faith and Credit" Clause* (1933) 81 U. OF PA. L. REV. 371.
8. 267 U. S. 544 (1925), 41 A. L. R. 1384 (1926), 24 MICH. L. REV. 65.

instant court,[9] it is questionable whether the rule of the *Green* case should be made subject to the intent of the parties. In cases where the issue is merely the choice of law to govern the interpretation of the wording of the contract, the express intent of the parties should be given full effect.[10] But where the validity of the contract is in question, the intent of the parties becomes secondary to more objective considerations.[11] The issue of the instant case seems clearly of this latter type. The rule of the *Green* and *Mixer* cases finds its justification not in any presumed intent of the contracting parties, but in the necessity of maintaining the integrity of the corporate structure and protecting the interests of other members by preserving a uniform definition of membership rights within a given society.[12] This purpose of the rule should not be defeated by allowing an Illinois society to become a Kansas society merely by describing itself as such in its certificate.

Constitutional Law—Corporations as "Persons" within the Meaning of the Fourteenth Amendment—California sought to tax plaintiff corporation, licensed to do business in California, on premiums received in Connecticut on Connecticut reinsurance contracts covering reinsuree's California policies. *Held,* that the tax violated plaintiff's rights under the due process clause of the Fourteenth Amendment;[1] Justice Black dissented on the ground that the word "person" in the Amendment does not include corporations. *Connecticut General Life Ins. Co. v. Johnson,* U. S. Sup. Ct., (1938) 5 U. S. L. WEEK 610.

The dissent of Justice Black marks the first time in many years that a Supreme Court Justice has contended that the protection of the Fourteenth Amendment does not extend to corporations. This dissent is based upon the concept that the corporation is a creature of the state, the latter having the absolute power of granting or refusing existence to it, and as such should be subject to any regulations or restrictions which the state sees fit to establish. After an elaborate inquiry into the history and language of the Amendment, Justice Black reached the conclusion that it was intended to include only natural persons,[2] and that therefore the right of the state to regulate corporations is not limited in any way thereby.[3] Others have reached similar conclusions in regard to the pur-

9. According to counsel for the appellant, this provision was designed to assure the member that he belonged to a society which was operating under the statute laws of his state pertaining to foreign sister state fraternal societies. See *Appellant's Motion for Rehearing* (Kan. Sup. Ct. No. 33394) p. 6 *et seq.*

10. Canton Ins. Office v. Woodside, 90 Fed. 301 (1898); GOODRICH, CONFLICT OF LAWS (1927) § 109. But *cf.* Owen v. Hagenbeck-Wallace Shows Co., 192 Atl. 158 (R. I. 1937), 86 U. OF PA. L. REV. 98.

11. New York Life Ins. Co. v. Cravens, 178 U. S. 389 (1899); E. Gerli & Co. v. Cunard S. S. Co., 48 F. (2d) 115; BEALE, CONFLICT OF LAWS (1935) § 332.2; GOODRICH, CONFLICT OF LAWS (1927) 232. But some courts have allowed the parties to choose their jurisdiction to a limited extent even under these circumstances. See BEALE, *loc. cit. supra.*

12. See Royal Arcanum v. Brashears, 89 Md. 624, 630, 43 Atl. 866, 867 (1899); Royal Arcanum v. Green, 237 U. S. 531, 542 (1915); Note (1926) 41 A. L. R. 1384, 1393.

1. For a discussion of the taxation question involved, see case note in this issue of the REVIEW at 554.

2. Immediately after the passage of the Amendment, the courts felt that the purpose was solely to protect the negroes. See Slaughter House Cases, 16 Wall. 36, 81 (U. S. 1872). *Cf.* Bradwell v. State, 16 Wall. 130 (U. S. 1872) (state law which forbade women from practising law held not within protection of 14th Amendment); Bartmeyer v. Iowa, 18 Wall. 129 (U. S. 1873) (state legislation as to sale of liquors not under its protection); Minor v. Happersett, 21 Wall. 162 (U. S. 1874) (right of suffrage not under privilege and immunities clause); Walker v. Sauvinett, 92 U. S. 90 (1875) (nor is right to trial by jury).

3. Instant case at 613.

pose of the Amendment.[4] On the other hand, since 1886,[5] the courts have extended the protection of due process to corporations, feeling that they are as much in need of protection against arbitrary and discriminatory legislation by the states as natural persons are.[6] The legal theory employed was one which existed even before the Fourteenth Amendment was passed.[7] Wherever a provision is made for the protection of contract or property rights of persons, the provision includes corporations, since the latter is made up of individuals or "persons" who are protected thereunder. "It would be a most singular result if the constitutional provision . . . should cease to exert such protection the moment a person becomes a member of a corporation." [8] In looking beyond the name of the artificial being to the individuals whom it represents, the courts find that the property of the corporation is the property of the shareholders, and that therefore the state cannot act without restriction merely because of the corporate fiction.[9] While there is much to be said for Justice Black's position as well as the one taken by the courts, to adopt the view that corporations are not entitled to due process of law would be to upset an enormous body of decisions [10] and might have serious effects on our economic system.[11]

Criminal Law—Electricity as the Subject of Larceny—Defendant, indicted for larceny for diverting electricity around a meter so as to prevent registration of the total amount used, moved to quash the indictment on the grounds that electricity was not the subject of larceny, and that a statute punishing the

4. See Dobyns, *Justice Holmes and the Fourteenth Amendment* (1918) 13 ILL. L. REV. 71; Graham, *The "Conspiracy Theory" of the Fourteenth Amendment* (1938) 47 YALE L. J. 371; Hough, *Due Process of Law Today* (1919) 32 HARV. L. REV. 218. See also Corwin, *The Doctrine of Due Process of Law Before the Civil War* (1911) 24 HARV. L. REV. 366; Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment* (1930) 18 CALIF. L. REV. 583.

5. In Santa Clara County v. Southern Pac. R. R., 118 U. S. 394 (1886), the Court refused to hear argument on whether the 14th Amendment applies to corporations. Said the Court, "We are all of the opinion that it does." *Id.* at 396.

6. Provident Savings Ass'n v. Kentucky, 239 U. S. 103 (1915); Hartford Acc. & Ind. Co. v. Delta & Pine Land Co., 292 U. S. 143 (1934), 34 COL. L. REV. 951, 82 U. OF PA. L. REV. 863. *Cf.* St. Louis Cotton Compress Co. v. Arkansas, 260 U. S. 346 (1922). See MCGEHEE, DUE PROCESS OF LAW (1906) c. 5; Willis, *Due Process of Law under United States Constitution* (1926) 74 U. OF PA. L. REV. 331.

7. In Society for the Propagation of the Gospel in Foreign Parts v. New Haven, 8 Wheat. 464 (U. S. 1823), it was held that corporations were "persons" within the meaning of a treaty providing that no person shall suffer future loss in his person, liberty, or property because of a part taken in a certain war.

8. Justice Field in The Railroad Cases, 13 Fed. 722, 744 (C. C. D. Cal. 1882), *aff'd*, 116 U. S. 138 (1882).

9. Under the same theory, prohibitions against the deprivation of life and liberty do not apply to corporations, because the lives and liberties of the shareholders are not the life and liberty of the corporation. Western Turf Ass'n v. Greenburg, 204 U. S. 359 (1907). Many cases, following the theory of Paul v. Virginia, 8 Wall. 168 (U. S. 1868), have also held that a corporation is not a person within the meaning of the privileges and immunities clause of the 14th Amendment since the citizenship of the incorporators is not the same as that of the corporation. See The Railroad Tax Cases, 13 Fed. 722, 747 (C. C. D. Cal. 1882).

10. But as pointed out in the dissent, at 612, the doctrine of *stare decisis* has a limited application in constitutional law. See Lipoff v. United Food Workers, Phila. Legal Intelligencer, Feb. 10, 1938, at p. 6, col. 4, noted in this issue of the REVIEW at 546.

11. For a criticism of Justice Black's dissent, see N. Y. Times, Feb. 2, 1938, p. 18, col. 2. This criticism is, however, unjust. It misinterprets Justice Black's position in that it implies that he is in favor of discarding the corporate entity theory, and would rather treat a corporation as a group of individuals. In fairness to Justice Black, his position should be stated to be merely that corporations are not "persons" within the meaning of the 14th Amendment, not that he thinks corporations are not "persons".

crime charged as a misdemeanor [1] prevented operation of the larceny statute.[2] The motion was granted. On appeal by the state, *held,* that the motion should have been denied because under the statute [3] electricity was the subject of larceny, and the fact that defendant's offense was also a misdemeanor did not prevent indictment for larceny.[4] *People v. Menagas,* 11 N. E. (2d) 403 (Ill. 1937).

Whether electricity can be the subject of larceny in the absence of a statutory declaration to that effect has never been directly decided by the courts of this country. The scarcity of decisions on this point is accounted for by the fact that practically all the states have statutes making offenses similar to that in the instant case misdemeanors.[5] Statements to the effect that electricity was not the subject of larceny at common law [6] merely express general opinion.[7] While electricity is regarded by scientists as incorporeal and merely a form of energy, it has been held to be personal property by courts dealing with situations unconnected with larceny.[8] Moreover, electricity is a valuable commodity, which is bought and sold like other personal property. It can be measured, and severed from a larger mass and distributed. As such it answers the tests laid down in the gas meter cases [9] for property capable of larcenous caption and asportation. Recognizing this, the Philippine Supreme Court, in *United States v. Carlos,*[10] held electricity to be the subject of larceny. In arriving at this conclusion the court said, "The true test of what is property the subject of larceny seems to be not whether the subject is corporeal or incorporeal, but whether it is capable of asportation by another".[11] While the court in the instant case was clearly in sympathy with this view, it felt constrained by general opinion and more particularly by one of its own dicta [12] to hold that at common law electricity was not the subject of larceny.[13] As a result the court was forced to stretch the meaning of "personal property" in the larceny statute in order to find that electricity was included in its provisions.[14] In using this basis for its decision, however, the

1. ILL. REV. STAT. (Cahill, 1933) c. 38, § 279.
2. ILL. REV. STAT. (Cahill, 1933) c. 38, § 380.
3. *Ibid.*
4. In holding that defendant was indictable for larceny despite the fact that his offense also constituted a misdemeanor, the court followed general law. People v. Moulton, 116 Cal. App. 552, 2 P. (2d) 1009 (1931); Woods v. People, 222 Ill. 293, 78 N. E. 607 (1906); People v. Malavassi, 248 App. Div. 784, 289 N. Y. Supp. 163 (2d Dep't, 1936).
5. E. g., ARIZ. REV. CODE (Struckmeyer, 1928) § 4761; CAL. PENAL CODE (Deering, 1931) § 499a; CONN. GEN. STAT. (1930) tit. 59, c. 325, § 6150; DEL. REV. CODE (1935) c. 150, § 5226; GA. CODE (1933) § 26-3801; N. Y. CONSOL. LAWS (Cahill, 1930) c. 41, § 1431; PA. STAT. ANN. (Purdon, 1930) tit. 18, § 3373; UTAH REV. STAT. (1933) tit. 103, c. 36, § 15; WASH. REV. STAT. (Remington, 1932) tit. 14, c. 9, § 2657; W. VA. CODE ANN. (1937) § 5985; WIS. STAT. (1931) § 343.33 (2).
6. See instant case at 406; Moline Water Power Co. v. Cox, 252 Ill. 348, 357, 96 N. E. 1044, 1047 (1911).
7. Compare 36 C. J. 738 with 17 R. C. L. 34; see Notes L. R. A. 1918C, 580, 582, (1907) 6 A. & E. ANN. CAS. 739.
8. Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936) (electricity property within the meaning of U. S. CONST. Art. IV, § 3); Hill v. Pacific Gas & Elec. Co., 22 Cal. App. 788, 136 Pac. 492 (1913); Sixty-Seventh South Munn, Inc. v. Board of Comm'rs, 106 N. J. L. 45, 147 Atl. 735 (Sup. Ct. 1929); *cf.* Moline Water Power Co. v. Cox, 252 Ill. 348, 96 N. E. 1044 (1911) (water power is an interest in real estate and not personal property).
9. See Woods v. People, 222 Ill. 293, 298, 78 N. E. 607, 608 (1906); Commonwealth v. Shaw, 86 Mass. 308, 309 (1862).
10. 21 Philippine Rep. 553. There was a statute involved in this case but it merely restated the common law.
11. *Id.* at 560.
12. See Moline Water Power Co. v. Cox, 252 Ill. 348, 357, 96 N. E. 1044, 1047 (1911).
13. See instant case at 406.
14. The court concluded that the Illinois larceny statute, *supra* note 2, providing that "Larceny shall embrace every theft which deprives another of his money or other personal property, or those means or muniments by which the right and title to property, real or per-

court seems to have overlooked the established rule that criminal statutes are to be construed in the manner most favorable to the defendant.[15]

Labor Law—Constitutionality of Pennsylvania Anti-Injunction Act—Plaintiff storeowner alleged that although he had no dispute with his two employes, the defendant labor union was picketing his shop in a violent and disorderly manner in order to force him to employ only union labor. *Held,* that a preliminary injunction should be denied, since under the facts as alleged the court is without authority to issue an injunction by the terms of the Labor Anti-Injunction Act of 1937,[1] which is not in violation of the United States Constitution. *Lipoff v. United Food Workers Union,* Phila. C. P. Ct. No. 6, Phila. Legal Intelligencer, Feb. 10, 1938, p. 1, col. 2.

In arriving at the instant decision the court concluded (1) that the dispute alleged was a "labor dispute" within the meaning of the act;[2] (2) that the act precluded the issuance of an injunction because the plaintiff had failed to allege that "the public officers charged with the duty to protect complainant's property are unable to furnish adequate protection";[3] (3) that under the Constitution of Pennsylvania the legislature may abolish or change the chancery powers conferred on the courts of common pleas;[4] (4) that the statute as applied does not violate the federal Constitution. Only the last of these conclusions presented any real difficulty to the instant court. Although the constitutionality of statutes forbidding the injunction of peaceful picketing is now settled,[5] the section of the Pennsylvania act here applicable limited the court's power to enjoin violent picketing in labor disputes. The only decision of the United States Supreme Court on this particular issue was in *Truax v. Corrigan,*[6] where a similar state statute was held to be in violation of the equal protection clause of the Fourteenth Amendment. The instant court refused to distinguish the *Truax* case but said it was no longer binding, because "intervening dicta of the appellate courts or supervening circumstances indicate that those courts would not hold today as they did before."[7] At first glance this might seem to be a radical departure from the rule of stare decisis; for admitting that the Supreme Court may and sometimes does overrule itself,[8] it does not follow that a lower court may overrule an appellate court precedent,[9] or

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sonal, may be ascertained", included electricity. It seems that the provisions of the statute broadening the common-law concepts were meant only to extend to choses in action and written evidences of property rights, neither of which were the subject of larceny at common law. See WHARTON, CRIMINAL LAW (1932) §§ 1113, 1114.

15. United States v. Resnick, 299 U. S. 207 (1936); State v. Cooper, 221 Iowa 658, 265 N. W. 915 (1936); Birdsall v. Lewis, 246 App. Div. 132, 285 N. Y. Supp. 146 (3d Dep't, 1936); Commonwealth v. Lanzetti, 97 Pa. Super. 126 (1929).

1. PA. STAT. ANN. (Purdon, Supp. 1937) tit. 43, § 206 *et seq.*

2. *Id.* at § 206c (a-c). For comprehensive list of cases interpreting similar statutes in other jurisdictions, see instant case at p. 6, col. 2.

3. PA. STAT. ANN. (Purdon, Supp. 1937) tit. 43, § 206i (f).

4. Art. V, § 20. See Penn Anthracite Mining Co. v. Anthracite Miners of Pa., 318 Pa. 401, 412, 178 Atl. 291, 296 (1935).

5. Senn v. Tile Layers Union, 301 U. S. 468 (1937), 37 COL. L. REV. 1227.

6. 257 U. S. 312 (1921); Notes (1922) 22 COL. L. REV. 252, 31 YALE L. J. 408.

7. Instant case at p. 6, col. 4.

8. Illustrations are cited in instant case at p. 6, col. 4. See dissenting opinion in Connecticut General Life Ins. Co. v. Johnson, U. S. Sup. Ct. 1938, 5 U. S. L. WEEK 610, 612, noted in this issue of the REVIEW at 543.

9. State courts are absolutely bound by the United States Supreme Court's decisions on federal questions. See Chesapeake & Ohio Ry. v. Martin, 283 U. S. 209, 221 (1935); Ed. Schuster & Co. v. Henry, 218 Wis. 506, 510, 261 N. W. 20, 22 (1935), *cert. denied, sub nom.* Henry v. Wadhams Oil Co., 296 U. S. 625. But see GRAY, THE NATURE AND SOURCES OF

rely on a wholly hypothetical modern appellate decision. But the instant court's reasoning is not indefensible even in terms of orthodox theory. The decision of the *Truax* case was based on the principle that it is unconstitutional discrimination to provide special rules to govern wrongs in labor disputes which are not followed elsewhere.[10] If the Supreme Court has in subsequent decisions abandoned this principle, a lower court would have ample justification for following the ratio decidendi of these later decisions, rather than the bare factual holding of the former case.[11] That the Supreme Court has reversed its attitude to this extent, however, is at least questionable.[12] Therefore it is difficult to see why the instant court relied on this line of reasoning in order to find it was not bound by a case which seems plainly distinguishable. The *Truax* case dealt with a statute construed as denying absolutely the injunctive remedy for admittedly tortious picketing in labor disputes.[13] The Pennsylvania Act on the other hand, merely requires it to be shown that the police are unable to furnish adequate protection before an injunction can be issued. Since this may be a common law requirement in any injunction proceedings for a continuing trespass,[14] the basis for the contention that the Pennsylvania statute denies equal protection, even under the strict rule of the *Truax* case, becomes somewhat tenuous.

Labor Law—Legality of Picketing Against Non-Union Product at Premises of Retailer—Labor union, after unsuccessfully attempting to obtain a union agreement with a manufacturer, sought to exert pressure upon him by picketing his product at the retail stores. Signs carried by the pickets informed the public that the store was selling a non-union product and requested them not to buy. No effort was made to induce the public to refrain from all dealings with the retailer. Plaintiff, one of the retailers, sought to enjoin the union activities. *Held* (one justice dissenting), that the injunction granted by the Appellate Division should be modified to permit peaceful picketing. *Goldfinger v. Feintuch*, 11 N. E. (2d) 910 (N. Y. 1937).

THE LAW (2d ed. 1927) 217, where two English appellate court cases are mentioned which were so clearly erroneous that the English lower courts have refused to follow them. The instant case should be compared with Parrish v. West Coast Hotel Co., 185 Wash. 581, 55 P. (2d) 1083 (1936), *aff'd*, 300 U. S. 379 (1937), where the state court refused to follow the case of Adkins v. Children's Hospital, 261 U. S. 525 (1923). The Supreme Court in affirming the state court's decision overruled the *Adkins* case.

10. 257 U. S. 312, 331 *et seq.* (1921).

11. ". . . the only thing in a Judge's decision binding as an authority upon a subsequent Judge is the principle upon which the case was decided. . . ." Osborne to Rowlett, 13 Ch. D. 774, 785 (1879). "The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large." SALMOND, JURISPRUDENCE (6th ed. 1920) 173. But *cf.* Oliphant, *A Return to Stare Decisis* (1928) 14 A. B. A. J. 71, 159.

12. The cases cited by the instant court, p. 6, col. 4-5, show that the Supreme Court is becoming increasingly willing to recognize the validity of distinctive rules to govern labor disputes, but the cases cited were concerned primarily with "due process" and the definition of interstate commerce. That the Court has changed its attitude in regard to "equal protection" was not conclusively shown. Also it is significant that the Supreme Court was careful to distinguish the *Truax* case in the opinion of Senn v. Tile Layers Union, 301 U. S. 468, at 479 (1937). That the Court *will* change its attitude in regard to equal protection is more probable but a lower court could not properly rely on this contingency.

13. See 257 U. S. 312, 328, 347 (1921).

14. Mechanics' Foundry v. Ryall, 75 Cal. 601, 17 Pac. 703 (1888). *Cf.* Great Northern Ry. v. Brosseau, 286 Fed. 414, 423 (D. N. D. 1923); Grace Co. v. Williams, 20 F. Supp. 263 (W. D. Mo. 1937). But see Green Island Ice Co. v. Norton, 42 Misc. 238, 241, 86 N. Y. Supp. 613, 615 (Sup. Ct. 1903). The law is not clear on this point, however, and the issue is seldom discussed by the authorities.

Labor's use of picketing as a weapon of industrial conflict has nowhere received more favorable treatment than in the courts of New York.[1] Though today generally recognized as a lawful means of coercing an employer to comply with the demands of the union,[2] if conducted peacefully [3] and in pursuance of a lawful purpose,[4] picketing activities are restricted by most courts to the premises of the employer with whom the union is engaged in dispute. Attempts to utilize such coercive methods against third persons, not parties to the conflict, for the purpose of inducing them to cease dealing with the employer, fall within the definition of "secondary boycotts",[5] and therefore have been enjoined.[6] In New York, however, the traditional ban of the "secondary boycott" has carried little weight, attention being given rather to the scope of the pickets' appeal to the public.[7] Thus, where the pickets' banners make no mention of the retailer but merely request prospective patrons not to buy the employer's product, the lower courts have consistently protected labor.[8] The worker, it is said, has the right to advertise his cause; he is doing so at the place where the appeal is likely to be most effective—the point of sale to the ultimate consumer; therefore, the fact that incidently the retailer's business is adversely affected is no reason for holding this method of securing public support unlawful. This conclusion is supported by the

1. See FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930) 44-46; Feinberg, *Analysis of the New York Law of Secondary Boycott* (1936) 6 BROOKLYN L. REV. 209; Notes (1936) 14 N. Y. U. L. Q. REV. 83, (1934) 9 ST. JOHN'S L. REV. 171.

2. Early decisions tended to hold all picketing illegal because necessarily intimidating. Atchison, Topeka & S. F. Ry. v. Gee, 139 Fed. 582 (S. D. Iowa, 1905); Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324 (1909). See also Hellerstein, *Picketing Legislation and the Courts* (1932) 10 N. C. L. REV. 158, 172; Lencioni, *Injunctions to Restrain Picketing* (1932) 66 U. S. L. REV. 310, 312.

3. United Chain Theatres v. Philadelphia Motion Pictures Operators' Union, 50 F. (2d) 189 (E. D. Pa. 1931); Exchange Bakery & Rest., Inc. v. Rifkin, 245 N. Y. 260, 157 N. E. 130 (1927); and see cases cited in WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932) 35, n. 1; Hellerstein, *supra* note 2, at 173, n. 2. On the subject of peaceful coercion generally, see Eskin, *The Legality of "Peaceful Coercion" in Labor Disputes* (1937) 85 U. OF PA. L. REV. 456.

4. Picketing, though peaceful, if in pursuit of an unlawful purpose, will be enjoined. Edelman, Edelman & Berrie, Inc. v. Retail Grocery and Dairy Clerks' Union, 119 Misc. 618, 198 N. Y. Supp. 17 (Sup. Ct. 1922); Heitkemper v. Central Labor Council, 99 Ore. 1, 192 Pac. 765 (1920); *cf.* New Negro Alliance v. Sanitary Grocery Co., 92 F. (2d) 510 (App. D. C. 1937). Generally demands for higher wages, shorter hours, and better working conditions are recognized as legitimate objects of industrial disputes. See Note (1920) 6 A. L. R. 909, 917. Today unionization of a plant is usually considered a lawful purpose, while some states have upheld the validity of disputes to obtain a closed shop. See Hellerstein, *Secondary Boycotts in Labor Disputes* (1938) 47 YALE L. J. 341, 343. For discussion of lawfulness of purpose in non-labor picketing see case note in this issue of the REVIEW at 556.

5. A "secondary boycott" has been defined as "a combination to influence *A* by exerting some sort of economic or social pressure against persons who deal with *A*." FRANKFURTER AND GREENE, *op. cit. supra* note 1, at 43. See also the definition laid down by Mr. Justice Pitney in Duplex Printing Co. v. Deering, 254 U. S. 443, 466 (1920).

6. Fink & Son v. Butchers' Union, 84 N. J. Eq. 638, 95 Atl. 182 (1915); Evening Times Printing & Pub. Co. v. American Newspaper Guild, 195 Atl. 378 (N. J. Ch. 1937); Meyer Packing Co. v. Butchers' Union, 18 Ohio N. P. (N. S.) 457 (1917); Parker Paint & Wall Paper Co. v. Local Union No. 813, 87 W. Va. 631, 105 S. E. 911 (1921).

7. New York, while ostensibly clinging to the dogma that secondary boycotts are illegal, circumvents the rule in certain instances by refusing to designate the union activity involved as a secondary boycott. See the concurring opinion of Judge Lehman, instant case at 914, and compare with the dissent of Judge Hubbs, instant case at 915.

8. Public Baking Co. v. Stern, 127 Misc. 229, 215 N. Y. Supp. 537 (Sup. Ct. 1926), *aff'd*, 216 App. Div. 831, 215 N. Y. Supp. 908 (1st Dep't, 1926); Engelmeyer v. Simon, 148 Misc. 621, 265 N. Y. Supp. 636 (Sup. Ct. 1933); Tri-boro Window Cleaning Co. v. Krat, 241 App. Div. 799, 270 N. Y. Supp. 921 (1st Dep't, 1934). The picketing must, of course, be peaceful. Stuhmer & Co. v. Korman, 241 App. Div. 702, 269 N. Y. Supp. 788 (2d Dep't, 1934), *aff'd*, 265 N. Y. 481, 193 N. E. 281 (1934).

recent anti-injunction statute [9] enacted in New York, prohibiting the enjoining of peaceful picketing in any labor dispute.[10] The express inclusion, in the definition of "labor dispute", of controversies between disputants who are not employer and employee [11] would seem to indicate an intention on the part of the legislature to validate the type of activity involved in the instant case despite the tenacity of the dogma that "secondary boycotts" are per se unlawful.[12] Moreover, in permitting mention to be made of the retailer's store, the court removed a tenuous distinction heretofore articulate in the lower court decisions, to the effect that any direct or indirect reference to the employer's customer was sufficient ground for the issuance of an injunction.[13] Inasmuch as such picketing is impossible without at least an inferential reference to the customer, its legality should be made to depend, not upon the nature of the pickets' signs, but rather upon the determination of the more fundamental question: At whom is the boycott primarily aimed? [14]

Negligence—Forseeability as the Test for Determining Whether an Intervening Cause Is Superseding—The car of plaintiff's intestate, being transported by defendant's ferry, was first in line on shipboard. *X*'s trailer-truck, equipped with defective brakes, was third. Defendant, although it had blocked the decedent's car, had both failed to block the car behind and negligently fastened its front gate. *X*, in violation of a federal statute, started his engine before the boat reached shore, and the truck, negligently left in gear, lurched forward with such force that the decedent's machine was pushed over its block, through the gate and into the river, causing the decedent to drown. *Held*, there was no liability, since *X*'s negligence was so extraordinary as to be unforseeable, and therefore constituted a superseding cause of the accident. *Hendricks v. Pyramid Motor Freight Corp.*, 195 Atl. 907 (Pa. 1937).

As has been described in a previous issue of the REVIEW,[1] the Pennsylvania courts have been in a state of confusion during the past decade on the question of intervening human negligence as superseding cause. In view of this confusion, the instant decision is important in that it has unequivocally adopted the prevailing modern rule of "forseeability" [2] as embodied in the *Restatement of Torts*.[3] It

9. N. Y. Laws 1935, c. 477, § 876-a. A discussion of the New York statute can be found in Feinberg, *supra* note 1, at 217.

10. N. Y. Laws 1935, c. 477, § 876-a, 1 (f) (5).

11. *Id.* § 876-a, 10 (c).

12. Similar statutes have been enacted in fourteen other jurisdictions. E. g., see NORRIS-LAGUARDIA ACT, 47 STAT. 70 (1932), 29 U. S. C. A. § 101 *et seq.* (Supp. 1937); MINN. STAT. (Mason, Supp. 1936) c. 23, §§ 4260-67; PA. STAT. ANN. (Purdon, Supp. 1937) tit. 43, § 206a *et seq.*; Wash. Laws Spec. Sess. 1937, c. 7, § 4. Compare the Wisconsin statute, which expressly provides that "nothing herein shall be construed to legalize a secondary boycott". WIS. STAT. 1931, 268.20 (1) (f). For a discussion of the effect of anti-injunction legislation on the established law, see Hellerstein, *supra* note 4, at 359.

13. Spanier Window Cleaning Co. v. Awerkin, 228 App. Div. 617, 232 N. Y. Supp. 886 (1st Dep't, 1928); National House Cleaning Contractors, Inc. v. Bobaluc, 243 App. Div. 699, 277 N. Y. Supp. 966 (1st Dep't, 1935).

14. See instant case at 912.

1. Eldredge, *Culpable Intervention as Superseding Cause* (1937) 86 U. OF PA. L. REV. 121, 126. The Court referred to this article in its opinion. See also Note (1928) 76 U. OF PA. L. REV. 720, and cases listed in RESTATEMENT, TORTS, PA. ANNOT. (1938) §§ 442 and 447.

2. Herman v. Markham Rifle Co., 258 Fed. 475 (E. D. Mich. 1918); Lake Erie & W. Ry. v. McConkey, 62 Ind. App. 447, 113 N. E. 24 (1916); Kentucky Independent Oil Co. v. Schnitzler, 208 Ky. 507, 271 S. W. 570 (1925); Consolidated Gas Co. v. Getty, 96 Md. 683, 54 Atl. 660 (1903); Gordon v. Bedard, 265 Mass. 408, 164 N. E. 374 (1929); Englehart v. Farrant, [1897] 1 Q. B. 240. But see Illinois Central R. R. v. Oswald, 338 Ill. 270, 273, 170 N. E. 247, 249 (1930). See HARPER, TORTS (1933) § 123; Bohlen, *Fifty Years of Torts* (1937) 50 HARV. L. REV. 1225, 1229.

3. RESTATEMENT, TORTS (1934) § 447.

is hoped that this decision has placed Pennsylvania in permanent accord with the majority of jurisdictions on this point.

Negligence—Unintentional Misrepresentation in Gratuitously Supplied Information—Complaint alleged that plaintiff, second mortgagee of *X*, telephoned defendant, first mortgagee, to inquire as to the interest *X* had in an estate of which defendant was trustee. Both mortgages were in default to the knowledge of both parties. Defendant agreed to supply plaintiff with a copy of the will creating the estate under which *X* claimed. Defendant, without using due care, sent a certified copy of the will of a different person having the same name which plaintiff relied upon to his detriment. *Held,* plaintiff has not stated a cause of action since not having alleged that it was part of defendant's business to furnish the information, no duty to use reasonable care can arise.[1] *Renn v. Provident Trust Co.,* 196 Atl. 8 (Pa. 1938).

The Pennsylvania Superior Court recently allowed recovery in a suit based on a negligent misrepresentation.[2] But the instant case involves problems which were not presented to the superior court: the information was gratuitous; the defendant was not in the business of supplying such information; and the harm suffered was financial rather than physical. The gratuitous nature of the information would not seem to be controlling for the action sounds in tort and not in contract. However, the gratuitous nature of an act is often regarded as material in other fields of tort law. For example, there is no duty to use reasonable care to discover defects in a chattel which is gratuitously supplied; and it might be argued that the duty should not be greater in supplying information.[3] But if the supplying of information is looked upon as the rendering of a service, then the principle of tort law that a person who gratuitously assumes to render a service obligates himself to proceed with due care would seem to apply.[4] As to the defendant's not being in the business of supplying information, previous Pennsylvania cases [5] as well as the *Restatement of Torts* [6] make this distinction and state that where defendant is so engaged he owes a duty to use due care. The *Restatement* refused to express an opinion as to the liability of a person who is not in the business, treating it with a *caveat.*[7] But the court in the instant case indicated that the fact that the defendant was not in the business of supplying information was the factor that barred recovery.[8] Perhaps this distinction is simply a "rule of thumb" to get to the more basic requirement that the informant must understand that the information will be relied upon.[9] The final distinction is in relation to the harm suffered being financial rather than physical. This distinction would seem to be due to the socially and historically preeminent position given to bodily

1. The court also said that plaintiff had not alleged that defendant knew the object of the request for the copy. It seems rather clear that if defendant knew plaintiff had a second mortgage in default and was inquiring for a copy of a will which defendant said created an interest for plaintiff's mortgagor, defendant must have known why plaintiff wanted the will.

2. Ebbert v. Philadelphia Electric Co., 126 Pa. Super. 351, 191 Atl. 384 (1937), 86 U. OF PA. L. REV. 107.

3. See Bohlen, *Misrepresentation as Deceit, Negligence, or Warranty* (1929) 42 HARV. L. REV. 732, 741.

4. HARPER, LAW OF TORTS (1933) § 81. "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." Cardozo, J., in Glanzer v. Shepard, 233 N. Y. 236, 239, 135 N. E. 275, 276 (1922).

5. M'Caraher v. Commonwealth, 5 W. & S. 21 (Pa. 1842); Houseman v. Girard Mutual B. & L. Ass'n, 81 Pa. 256 (1876).

6. RESTATEMENT, TORTS (Tent. Draft No. 13, 1936) § 628.

7. *Id.,* first *caveat.*

8. Instant case at 10.

9. That the court had this in mind is evidenced by their use of the reasoning that defendant did not know why plaintiff wanted the information. See *supra* note 1.

security in tort law, rather than to any logical difference.[10] Manifest from the confusion in the field and the refusal of the *Restatement* to take a stand, the principles which control recovery for a negligent misrepresentation are not clear. However, it is significant that the Pennsylvania courts are handling the problem in terms of negligence principles, rather than relying on the inapplicable rules of common law deceit.[11]

Public Officers—De Facto Status of Incumbent in Absence of De Jure Office—Plaintiff sought compensation for professional services furnished by him under a contract made with defendant city through its city manager and commissioners. Subsequent to the contract, the statute creating these offices was declared unconstitutional. *Held,* although no de jure offices ever existed, the incumbents were de facto officers and bound the city to the contract. *Michigan City v. Brossman,* 11 N. E. (2d) 538 (Ind. App. 1937).

In the absence of any color of constitutional or legislative authority for an office, it is uniformly held that a de facto incumbency cannot exist.[1] And since *Norton v. Shelby County* [2] the prevailing judicial formula has required a de facto officer to occupy, at least, a de jure office.[3] Because of its frequent conflict with the public policy upon which the law of de facto officers is predicated,[4] the rigidity of the rule has been modified in many states and denied recognition in others. Thus, exceptions have been made (a) where the office has a potential existence although lacking de jure character because of noncompliance with necessary statutory provisions,[5] (b) where the officer was elected or appointed before the effective date of the enactment authorizing the office,[6] (c) where more individuals have been selected for office than there were offices of a particular denomination,[7] (d) where another office of a de jure nature existed with powers similar to those assumed,[8] (e) where the incumbent has exercised the functions of an office subsequent to its abolition,[9] and (f) where the existence of the office was predicated upon an inapplicable statute.[10] Most courts have denied de facto status where the

10. See Bohlen, *supra* note 3, at 742.
11. See (1937) 86 U. OF PA. L. REV. 107.

1. Schulte v. Wilke, 167 Ala. 663, 52 So. 526 (1910); Herrington v. State, 103 Ga. 318, 29 S. E. 931 (1898); Metropolis v. Industrial Comm., 339 Ill. 141, 171 N. E. 167 (1930); Minnesota *ex rel.* Tamminen v. Eveleth, 189 Minn. 229, 249 N. W. 184 (1933).
2. 118 U. S. 425 (1886).
3. State v. Malcom, 39 Idaho 185, 226 Pac. 1083 (1924); State *ex rel.* Abington v. Reynolds, 280 Mo. 446, 218 S. W. 334 (1920); Hamrick v. Simpler, 127 Tex. 428, 95 S. W. (2d) 357 (1936). *Contra:* Wendt v. Berry, 154 Ky. 586, 157 S. W. 1115 (1913); Lang v. Bayonne, 74 N. J. L. 455, 68 Atl. 90 (1907), 6 MICH. L. REV. 354 (1908).
4. See *infra* note 15.
5. Buck v. Eureka, 109 Cal. 504, 42 Pac. 243 (1895); Clark v. Easton, 146 Mass. 43, 14 N. E. 795 (1888).
6. State *ex rel.* Bockmeier v. Ely, 16 N. D. 569, 113 N. W. 711 (1907). *Contra:* State v. Shuford, 128 N. C. 588, 38 S. E. 808 (1901). It has been held, also, that such incumbents are de facto officers from the effective date of the statute. Yorty v. Paine, 62 Wis. 154, 22 N. W. 137 (1885).
7. Butler v. Phillips, 38 Colo. 378, 88 Pac. 480 (1906); Walcott v. Wells, 21 Nev. 47, 24 Pac. 367 (1890).
8. *Ex parte* State *ex rel.* Att'y Gen., 142 Ala. 87, 38 So. 835 (1905); Att'y Gen. *ex rel.* Dingeman v. Lacy, 180 Mich. 329, 146 N. W. 871 (1914); *In re* Woolcott, 163 Wis. 34, 157 N. W. 553 (1916).
9. Arnold v. Hilts, 61 Colo. 8, 155 Pac. 316 (1916); *cf.* Keeling v. Pittsburg, V. & C. Ry., 205 Pa. 31, 54 Atl. 485 (1903). *Contra:* State *ex rel.* Abington v. Reynolds, 280 Mo. 446, 218 S. W. 334 (1920); Elyria v. Vandemark, 100 Ohio St. 365, 126 N. E. 314 (1919).
10. Lampasas v. Talcott, 94 Fed. 457 (C. C. A. 5th, 1899).

statute creating the office assumed was later declared void.[11] However, as indicated by the instant decision, there is respectable authority validating acts performed before a judicial determination of the constitutionality of the enactment and negativing, in general, the necessity of a de jure office where the incumbent has acted under the cloak of legislative authority.[12] Manifestly, it is unjust to require the individual to determine, at his peril, the validity of the office which the incumbent purports to fill. Furthermore, there is an apparent conflict between the dogma of the *Norton* case and the accepted principle that the legality of a municipal corporation, established under color of law, cannot be collaterally attacked;[13] for since a city must act through its officers, the legality of its existence may thus be impugned.[14] In view of the policy protecting the interests of the public and innocent third parties, from which the validity of the acts of de facto officers has derived its chief support,[15] the holding of the instant court is commendable in furthering a desirable trend in the law.

Taxation—Disallowance of Credit of British Income Tax Against Federal Income Tax—Taxpayer having received dividends from British corporations from which the English standard tax had been deducted,[1] included both the net amount received and the amount of the tax deducted in gross income and then credited as provided in § 131 [2] a portion of the English tax against his federal income tax. *Held,* no credit is permissable since the corporation and not the shareholder pays the English tax. *Biddle v. Commissioner of Int. Rev.,* 58 Sup. Ct. 379 (1938).[3]

The avowed purpose [4] of § 131, in providing [5] that a citizen of the United States shall be entitled to a credit under proper limitations for income taxes paid

11. Norton v. Shelby County, 118 U. S. 425 (1886); King Lumber Co. v. Crow, 155 Ala. 504, 46 So. 646 (1908); People v. Toal, 85 Cal. 333, 24 Pac. 603 (1890); State v. Malcom, 39 Idaho 185, 226 Pac. 1083 (1924); Board of Public Utilities v. New Orleans Ry. & Light Co., 145 La. 308, 82 So. 280 (1919); Hamrick v. Simpler, 127 Tex. 428, 95 S. W. (2d) 357 (1936); Field, *Effect of an Unconstitutional Statute* (1926) 1 IND. L. J. 1, 5. For a severe criticism of the majority rule on a related point, see Crocker, *The Tort Liability of Public Officers Who Act Under Unconstitutional Statutes* (1929) 2 So. CALIF. L. REV. 236, 242-245.

12. Wendt v. Berry, 154 Ky. 586, 157 S. W. 1115 (1913); State v. Pooler, 105 Me. 224, 74 Atl. 119 (1909), 8 MICH. L. REV. 229 (1910); Burt v. Winona & St. P. R. R., 31 Minn. 472, 18 N. W. 285 (1884); Lang v. Bayonne, 74 N. J. L. 455, 68 Atl. 90 (1907), 6 MICH. L. REV. 354 (1908); see Commonwealth v. McCombs, 56 Pa. 436, 438 (1867).

13. See 1 DILLON, MUNICIPAL CORPORATIONS (5th ed. 1911) § 66 and cases cited therein.

14. This evident inconsistency was noted by Gummere, C. J., in Lang v. Bayonne, 74 N. J. L. 455, 462, 68 Atl. 90, 93 (1907).

15. State v. Carroll, 38 Conn. 449, 467 (1871); State v. Pooler, 105 Me. 224, 229, 74 Atl. 119, 121 (1909); Petersilea v. Stone, 119 Mass. 465, 468 (1876).

1. One of the dividends was a gross dividend paid "less tax", INCOME TAX ACT, 1918, 8 & 9 GEO. V, c. 40, General Rule 20. The others were net dividends certified "free of tax". There seems to be no practical difference. Biddle v. Commissioner, 86 F. (2d) 718, 720 (C. C. A. 2d, 1936).

2. 45 STAT. 829 (1928), 26 U. S. C. A. § 131 (1935). Under the 1928 Act the taxpayer could also deduct from gross income the amount of the foreign tax not allowable as a credit. Since the 1932 Act the taxpayer has been precluded from claiming a deduction for that portion of the tax not allowable as a credit. 47 STAT. 179 (1932), 26 U. S. C. A. § 23 (c), 2 (1935).

3. *Helvering v. Elkins* was united in the appeal.

4. Burnet v. Chicago Portrait Co., 285 U. S. 1 (1932); Hubbard v. United States, 17 F. Supp. 93 (Ct. Cl. 1936), *cert. denied,* 300 U. S. 666 (1937); 3 PAUL AND MERTENS, FEDERAL INCOME TAXATION (1934) § 31.01.

5. ". . . the tax imposed by this title shall be credited with: . . . the amount of any income . . . taxes paid or accrued during the taxable year to any foreign country. . . ." 45 STAT. 829 (1928), 26 U. S. C. A. § 131 (a) (1) (1935).

to a foreign country, has been to prevent double taxation. Thus it is necessary to determine whether the British corporation [6] or the shareholder paid the tax deducted from the dividends within the meaning of the Revenue Act. The English tax system is based on the theory that all income shall be taxed at the source.[7] There is only one standard tax on income earned by a corporation. The corporation pays this tax directly and the shareholder by deduction,[8] but it is only paid once. In England this system of deduction is considered as a payment by the recipient.[9] While it is true that the corporation and not the shareholder is directly liable for the payment of the tax,[10] it is not necessary even in this country for the taxpayer to make a direct payment in order to be considered as having paid the tax.[11] The recipient of income is required by English law to submit to the deduction;[12] if he is not subject to tax he may claim a refund from the Crown for the amount deducted;[13] if he is subject to the surtax he must include the amount of the tax deducted as income;[14] under certain circumstances he may be liable to direct assessment on the dividend if the corporation has not paid the tax;[15] and finally the House of Lords has held in *Ashton Gas Co. v. Attorney General*[16] that where a company is limited by its charter to the payment of dividends not to exceed ten per cent, the amount of the appropriate tax should be included in ascertaining the proper amount to be paid as a ten percent dividend. While the Court conceded[17] that the factors regarding the refunds and the surtax supported the English conception that the shareholder pays the tax, it failed to discuss the other factors and concluded that the English standard tax was similar in economic effect to our corporate income tax; that since the shareholder in an American corporation is not allowed to credit the tax paid by the corporation, the shareholder in the English corporation should not be granted the privilege, or at least that Congress in using the word *paid* did not intend to grant it to him. It is true that an Act of Congress has its own criteria

6. In Welsh v. St. Helens Petroleum Co., 78 F. (2d) 631 (C. C. A. 9th, 1935) a British corporation subject to United States income tax on the profits from oil wells in California was allowed to deduct from its federal tax the English tax paid on these profits even though it could recoup the English tax from the shareholders. The Treasury had held prior to this decision that the shareholder and not the corporation was entitled to the credit or deduction. IV-1 CUM. BULL. 198 (1924); V-1 CUM. BULL. 89 (1925).

7. INCOME TAX ACT, 1918, 8 & 9 GEO. V, c. 40. The English Act defines a corporation as "a body of persons", considering each shareholder as something like a partner from whom the corporation may get the tax paid. See United Shoe Mach. Corp. v. White, 89 F. (2d) 363, 366 (C. C. A. 1st, 1937).

8. INCOME TAX ACT, 1918, 8 & 9 GEO. V, c. 40, General Rule 20.

9. Instant case at 381.

10. See Neumann v. Commissioners of Inland Rev., [1934] A. C. 215, 235. This case is distinguished on its peculiar facts in Commissioners of Inland Rev. v. Pearson, [1936] 2 K. B. 533. The latter case approves the language of Ashton Gas Co. v. Attorney General, [1906] A. C. 10, cited *infra* note 16, that "The companies here, in paying income tax under Sch. D out of their profits pound by pound, and subsequently declaring dividends . . . were in effect deducting income tax . . . (and) relieving the shareholder from liability."

11. The doctrine of constructive receipt was expressly recognized in Old Colony Trust Co. v. Commissioner, 279 U. S. 716 (1929) (payment by an employer of the income taxes assessable against the compensation of the employee constitutes additional taxable income to the employee).

12. INCOME TAX ACT, 1918, 8 & 9 GEO. V, c. 40, General Rule 23.

13. *Id.* § 29. The language of this section is significant as indicating that the shareholder pays the tax: "If it is proved . . . that any person . . . has *paid* any tax, by *deduction* or otherwise . . ." (Ital. added).

14. *Id.* § 4.

15. *Id.* § 211.

16. [1906] A. C. 10.

17. Instant case at 382.

of the meaning of the words used in the Act irrespective of local law,[18] and that the burden of economic double taxation is no greater on the shareholder in the English corporation than in the American. But it is doubtful whether the Court would have reached the same result if the dividend involved had been of the ten percent limited preferred type involved in the *Ashton* case.[19]

Taxation—Invalidity of State Tax on Insurance Companies Measured by Gross Premiums Including Those from Reinsurance Effected in Another State—A California tax on insurance companies was measured by gross premiums on business done in California, less deductions for premiums paid by way of reinsurance to other corporations licensed to do business in the state.[1] California sought to include, in taxing the plaintiff, a Connecticut corporation authorized to do insurance business in California, reinsurance premiums received by plaintiff from other foreign licensed corporations on policies on the lives of California residents. These reinsurance contracts were entered into in Connecticut, and the premiums and losses, if any, were payable there. *Held* (Justice Black dissenting),[2] that the tax infringes the due process clause of the Fourteenth Amendment.[3] *Connecticut General Life Ins. Co. v. Johnson,* U. S. Sup. Ct., (1938) 5 U. S. L. WEEK 610.

It is generally accepted that in making contracts of reinsurance in State *A* with insurers of lives or property in State *B,* a foreign insurance company is not doing business in State *B* [4] so as to be subject to its reasonable regulations on foreign corporations;[5] and hence state *B* may not, without violating the due process clause, tax those premiums. Any other rule with respect to taxes, would usually result in double taxation on premiums from contracts insuring what is, in effect, the same risk. The premiums of the original policy would be taxable to the insurer, and the reinsurance premiums to the reinsurer. California, however, has specifically provided against this double taxation.[6] Further, while the reinsurer does not become actually substituted for the insurer on the original policy, the practical effect of the reinsurance is that the reinsurer receives the benefits and bears the risks of the original policy. As a result of this decision, California will undoubtedly not allow its deduction provision to remain and the original insurer

18. See Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 294 (1917); Weiss v. Wiener, 279 U. S. 333, 337 (1929); Burnet v. Harmel, 287 U. S. 103, 110 (1932). But *cf.* United Dyewood Corp. v. Bowers, 56 F. (2d) 603 (C. C. A. 2d, 1932); Keene v. Commisioner, 15 B. T. A. 1243 (1929) (French income tax based on the arbitrary figure of seven times the rental value of the taxpayer's residence held to be an income tax paid within the meaning of § 131 although such a figure was not income under our Revenue Acts).

19. See *supra* note 10 and 16.

1. CAL. CONST. (1879) Art. XIII, § 14 (b).

2. For discussion of Justice Black's dissent, see case note in this issue of the REVIEW at 543.

3. The California Supreme Court twice upheld this tax on the plaintiff. In the first suit, an appeal from its decision in 3 Cal. (2d) 83, 43 P. (2d) 278 (1935), was dismissed for want of a properly presented federal question, 296 U. S. 535 (1935). The instant case is an appeal from 8 Cal. (2d) 675, 67 P. (2d) 675 (1937).

4. There is no transaction or privity between the reinsurer and those originally insured. Morris & Co. v. Skandinavia Ins. Co., 279 U. S. 405, 408 (1929).

5. Indiana v. Continental Ins. Co. of N. Y., 67 Ind. App. 536, 116 N. E. 929 (1917); *In re* Continental Casualty Co., 189 Iowa 933, 179 N. W. 185 (1920); Sea Ins. Co. v. Graves, 274 N. Y. 312, 8 N. E. (2d) 872 (1937).

6. The company which insured the original risk in California is allowed to deduct any reinsurance premiums paid to one doing business in California. The reinsurer would, in effect, pay the tax on the original premiums when he returned the tax on the reinsurance premiums. CAL. CONST. (1879) Art. XIII, § 14 (b).

will be forced to pay a tax on premiums the benefits from which he does not actually receive. However, a contrary decision in this case, while it might lead to a more realistic and just result, would be difficult to support in terms of legal theory since it would involve saying that whether or not a corporation affecting reinsurance is doing business in a state depends on whether that state has a statute which eliminates double taxation.[7] In view of these legal difficulties and the weight of authority, another decision could not well have been given.

Taxation—Validity of Income Tax on Proceeds of Discretionary Trust Held and Managed Outside Taxing State—Petitioner, a resident of Virginia and the beneficiary under a discretionary trust, sought a refund of income tax paid to Virginia on the income from the trust which was held and managed in the state of New York. The trustees also paid an income tax to New York on the proceeds of the corpus before turning them over to petitioner. *Held,* that the tax was authorized by statute,[1] and that inasmuch as it was not levied on property outside the jurisdiction of the taxing state, there was no denial of due process. *Ryan v. Commonwealth,* 193 S. E. 534 (Va. 1937).

Since the Supreme Court in a series of decisions culminating in the *Cohn* case,[2] noted in a previous issue of the REVIEW,[3] has upheld the right of a domiciliary state to tax the income of its residents derived from sources outside the state,[4] the instant case seems to be correct in result. However, it fulfills the predictions made after the *Cohn* case that double taxation would result from that decision,[5] and likewise shows clearly that relief from such taxation will have to come from the legislatures through the medium of reciprocal tax provisions.[6]

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7. "It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax. . . ." Instant case at 611.

1. Although the provisions of the Virginia tax code relating to discretionary trusts [VA. CODE ANN. (Michie, 1936) app. § 50] provide for taxation of only the trustee, it was held that this applied only to domestic trusts and that income from foreign trusts came under the general definition of gross income. VA. CODE ANN. (Michie, 1936) § 24: "The term 'gross income' . . . includes gains . . . derived from any source whatever, including . . . income derived through estates or trusts by the beneficiaries thereof. . . ." But see VA. CODE ANN. (Michie, 1936) § 40 providing for reciprocal credits in the case of taxes paid other states by non-residents subject to a Virginia tax, which seems to indicate a general legislative intent to avoid double taxation.

2. People *ex rel.* Cohn v. Graves, 300 U. S. 308 (1937), 37 COL. L. REV. 661, 21 MINN. L. REV. 759.

3. (1937) 85 U. OF PA. L. REV. 645.

4. Maguire v. Trefry, 253 U. S. 12 (1920); Lawrence v. State Tax Comm., 286 U. S. 276 (1932). See Rottschaefer, *State Jurisdiction to Tax Income* (1937) 22 IOWA L. REV. 292.

5. "Because jurisdiction of one state to tax income on the basis of localization within it of the source of the income is apt to co-exist with the jurisdiction of a second state to tax the same income on the basis of domicile, it would seem that the instant case [*Cohn* case] opens wide the door to multi-state income taxation." (1937) 21 MINN. L. REV. 759, 761.

Double taxation has been declared unconstitutional in the case of tangible personalty, Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905), and inheritance taxation, Frick v. Pennsylvania, 268 U. S. 473 (1925); First Nat. Bank v. Maine, 284 U. S. 312 (1932). The question of double taxation of intangible personalty appears to be unsettled. Compare Cream of Wheat Co. v. Grand Forks, 253 U. S. 325 (1920) with Safe Dep. Trust Co. of Baltimore v. Virginia, 280 U. S. 83 (1929). See also Commonwealth v. Madden's Ex'r, 265 Ky. 684, 97 S. W. (2d) 561 (1936), 85 U. OF PA. L. REV. 427 (1937) with which compare Newark Fire Ins. Co. v. State Board of Tax Appeals, 193 Atl. 912 (N. J. 1937), 86 U. OF PA. L. REV. 107. See Brown, *Multiple Taxation by the States—What is Left of It?* (1935) 48 HARV. L. REV. 407.

6. See reciprocal tax provisions of Virginia code, *supra* note 1.

Taxation—Validity of Pennsylvania Share Tax as Now Construed—By an Act of 1907,[1] a tax was imposed on shares of trust companies the valuation of which was determined by dividing the sum of the value of paid in capital stock, surplus, and undivided profits by the number of outstanding shares. A 1929 amendment [2] provided for a deduction from the tax base of such amount as represented shares in corporations liable to pay the state capital stock tax, or exempted therefrom. Though the amendment did not expressly so provide, the state court [3] sustained deductions for federal securities by finding a "legislative intent to exclude" [4] them. On appeal to the Supreme Court of the United States, *held,* that the state court is not precluded from construing the statute so as to avoid constitutional objections,[5] and that the statute, as now construed, involves no unconstitutional discrimination. *Schuylkill Trust Co. v. Pennsylvania,* 58 Sup. Ct. 295 (1938).

The interesting problems at issue in the instant case have been fully discussed in a previous issue of the REVIEW.[6] The Pennsylvania court, in an earlier opinion involving the same case,[7] had refused exemption for federal securities. The Supreme Court of the United States, on appeal, reversed the judgment and remanded the cause [8] on the grounds that the tax represented an unconstitutional discrimination, whereupon the revised construction involved in the present decision was adopted by the Pennsylvania court.[9]

Torts—Right of Neighborhood Storeowners to Picket Competitors to Force Them to Close on Specified Days—Defendant, an association of neighborhood food storeowners, having adopted the policy of closing their stores on Wednesday afternoons and Saturday evenings, picketed several competing stores which continued to do business at these specified times. The dissenting storeowners organized the plaintiff association which now seeks to enjoin the defendant from picketing its members. *Held,* that an injunction against peaceful picketing is denied [1] because defendant has justified its conduct as a means of attaining a "maximum work-week", a reasonably desirable social objective. *Individual Retail Store Owners Ass'n v. Penn Treaty Food Stores Ass'n,* Phila. C. P. Ct. No. 6, Jan. 20, 1938.

Although the instant case is the first in which a Pennsylvania court has been called upon to determine the legality of picketing in a non-labor controversy,[2] the

1. PA. STAT. ANN. (Purdon, 1931) tit. 72, § 1991.
2. *Id.* at § 2001.
3. 327 Pa. 127, 193 Atl. 638 (1937).
4. *Id.* at 133, 193 Atl. at 640. As to the implication of a legislative intent not to violate the Constitution, see Estate of Johnson, 139 Cal. 532, 73 Pac. 424 (1903); Woolf v. Fuller, 87 N. H. 64, 174 Atl. 193 (1934).
5. Instant case at 298.
6. Note (1936) 84 U. OF PA. L. REV. 758.
7. Commonwealth v. Schuylkill Trust Co., 315 Pa. 429, 173 Atl. 309 (1934).
8. Schuylkill Trust Co. v. Pennsylvania, 296 U. S. 113 (1935), 34 MICH. L. REV. 896 (1936).
9. Commonwealth v. Schuylkill Trust Co., 327 Pa. 127, 193 Atl. 638 (1937).

1. The instant court had no trouble in deciding that the present situation did not involve a "labor dispute" within the provisions of the recent Pennsylvania Anti-Injunction Act, PA. STAT. ANN. (Purdon, Supp. 1937) tit. 43, § 206c, and therefore it could not be invoked. Although an injunction was issued, it was merely intended to set the bounds of peaceful picketing. The number of pickets before each store was restricted to two. Their placards were enjoined from giving any connotation of a labor controversy. No violence, trespass, or active intimidation was permitted.

2. It seems clear that Pennsylvania now follows the majority view recognizing the legality of peaceful picketing in labor controversies. Kirmse v. Adler, 311 Pa. 78, 166 Atl. 566

problem has arisen several times in the past few years in other jurisdictions.[3] Because of the conflicting social policies involved, the decisions in these cases have not been uniform.[4] But only one case has been found in which any court has indicated that the privilege of picketing must be reserved solely for labor disputes.[5] There would seem to be little basis for such a discrimination, for peaceful picketing is no more dangerous than combinations in general, boycotts, and the circulation of propaganda by members of a trade. All of these have often been permitted by the courts when their aim has been the elevation of business dealings to a higher plane, socially or economically.[6] But since damage is intentionally caused to the business interest of the person picketed, the pickets must legally justify their conduct in order to escape liability for what is prima facie a tort.[7] However, as the instant court points out, it is beyond the scope of the judicial process to balance the social desirability of the ends sought by the pickets against the inevitable damage caused to the person picketed and to the public. It should be sufficient that the motive of the picketing in a given case is a reasonably justifiable cause, under the circumstances, in order to privilege the intentional invasion of the business interest of the other person, with due consideration given to the necessity of picketing to secure the ends in view. It would seem that the instant case represents a sound application of these principles and clearly recognizes the utility of picketing as a publicity mechanism in an honest effort to dispose of an existing economic dispute.[8]

(1933). See also for discussion of picketing in general, Cooper, *The Fiction of Peaceful Picketing* (1936) 35 MICH. L. REV. 73; Eskin, *The Legality of "Peaceful Coercion" in Labor Disputes* (1937) 85 U. OF PA. L. REV. 456; Lencioni, *Injunctions to Restrain Picketing* (1932) 66 U. S. L. REV. 310.

3. Green v. Samuelson, 168 Md. 421, 178 Atl. 109 (1935) (picketing by negroes to force merchants to employ their race enjoined); Julie Baking Co. v. Graymond, 152 Misc. 846, 274 N. Y. Supp. 250 (Sup. Ct. 1934), 4 BROOKLYN L. REV. 91 (picketing by customers to protest extortionate prices allowed); Roseman v. United Strictly Kosher Butchers, 163 Misc. 331, 298 N. Y. Supp. 343 (Sup. Ct. 1937) (butchers picketing butchers to disprove inference that all meat sold was kosher allowed); Barnes-Arno Bldg. Corp. v. Hoffman, N. Y. L. J., Mar. 6, 1933, p. 1324 (picketing by tenants over rentals allowed); People v. Kopezak, 153 Misc. 187, 274 N. Y. Supp. 629 (N. Y. City Ct. 1934) (picketing by tenants over rentals held to be breach of the peace); Bernstein v. Retail Cleaners' & Dyers' Ass'n, 31 Ohio N. P. (N. S.) 433 (1934) (picketing of competitors for reducing prices below those fixed by N. I. R. A. code allowed). See also Note (1935) 99 A. L. R. 533; (1933) 33 COL. L. REV. 1267.

4. See *supra* note 3.

5. See A. S. Beck Shoe Corp. v. Johnson, 153 Misc. 363, 369, 274 N. Y. Supp. 946, 953 (Sup. Ct. 1934), 83 U. OF PA. L. REV. 383 (1935), 48 HARV. L. REV. 691, 35 COL. L. REV. 121. See also Exchange Bakery & Rest., Inc. v. Rifkin, 245 N. Y. 260, 264, 157 N. E. 130, 133 (1927). But *cf.* cases cited *supra* note 3.

6. Appalachian Coals, Inc. v. United States, 288 U. S. 344 (1933) (not unreasonable restraint of trade under Sherman Anti-Trust Act); Booker & Kinnaird v. Louisville Bd. of Fire Underwriters, 188 Ky. 771, 224 S. W. 451 (1920); Wolfenstein v. Fashion Originators' Guild, 244 App. Div. 656, 280 N. Y. Supp. 361 (1st Dep't, 1935); see also Note (1934) 92 A. L. R. 185.

7. FRANKFURTER AND GREEN, THE LABOR INJUNCTION (1929) 24 *et seq.*; HARPER, TORTS (1933) § 232 *et seq.*; Holmes, *Privilege, Malice, and Intent* (1894) 8 HARV. L. REV. 1, 3.

8. "It [picketing] is a publicity mechanism designed to advise the public of the existence of a present controversy between those picketing and the one picketed. . . . But if the objective is the honestly believed correct disposition of a real and existing economic dispute, it is legal. Its purpose is to advise those who observe the information published and circulated by the picketer that the controversy exists and its appeal is to those believing in the cause of the picketer to aid as they lawfully may in the proper settlement of the contests." Bernstein v. Cleaners' & Dyers' Ass'n, 31 Ohio N. P. (N. S.) 433, 436 (1934).